IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 582 OF 2007

KRISHNAN MUKUND NAIK AND 5 ORS., ... Petitioners
Versus
MRS. ANNE LOBO AND 5 ORS., ... Respondents

Mr. V. A. Lawande, Advocate for the Petitioners.

Mr. J. Vaz, Advocate for the Respondents.

Coram:- N. A. BRITTO, J.

Date:- 6th December, 2007

P.C.:-

Heard learned Counsel on behalf of both parties.

The challenge in this petition is by the defendants in S.C.S. No.43/2004/B to the Order dated 14-8-2007 of the learned Civil Judge, Senior Division, Mapusa.

The plaintiffs(the respondents herein) had filed a suit against the defendants, inter alia, for a declaration that the suit properties surveyed under Nos.129/1, 129/5 and 129/6 belong to the plaintiffs, as co-owners. The defendants had filed their written statement and had raised a counterclaim stating that they were the owners in peaceful possession and enjoyment of the said properties and therefore the name of defendant no.1 was correctly recorded as the occupant in the survey records. The plaintiffs filed their written statement to the said counterclaim, and, as stated on behalf of the plaintiffs by their learned Counsel the suit is now fixed for the evidence of the plaintiffs.

The defendants filed an application for amendment, inter alia, for the purpose of withdrawing the said claim and counterclaim of adverse possession and taking a plea of tenancy and mundkarship. The said application came to be dismissed by the impugned order. In dismissing

the said application, the learned trial Court observed that the defendants in the original written statement had taken the defence of adverse possession in respect of the suit properties and by the proposed amendment they were seeking to delete the plea of adverse possession taken earlier and include the plea of tenancy and mundkarship in respect of the suit properties. The learned trial Court further observed that allowing the amendment application would amount to changing the very character of the defence taken in the written statement and which would cause prejudice to the plaintiffs as the suit was already fixed at the stage of evidence. The learned trial Court also noted that the counterclaim was also replied to by the plaintiffs by filing a written statement to the counterclaim and which counterclaim was for a declaration that the defendants were the owners of the suit properties.

Learned Counsel on behalf of the plaintiffs has placed reliance on an unreported decision of this Court dated 21-10-2005 in Writ Petition No.284 of 2005 in the case of Mr. Arnold Nazareth and another v. Mr. Nicolau Fernandes (dec.) and another. In that case the plea originally taken by the defendant in the written statement was that he was the mundkar and the Court held that it was permissible for him to plead that he was a tenant. Learned Counsel also placed reliance on the case of Basavan J. Dhobi(1995 Supp (3) SCC 179) wherein the Apex Court has held that it is open to the defendant to take a contrary stand by amending the written statement and thereby the cause of action is not in any manner affected and this principle would also apply in a case where the plaint is being amended so also as to introduce a new cause of action. Reliance is also placed on the case of Usha B. Swami and others v. Kiran A. Swami and others(2007(5) Mh. L. J. 593) wherein the Apex Court has held that the general principle that amendment of pleadings cannot be allowed so as to alter materially or substitute cause of action or the nature of claim applies to amendments to plaint. It has no counterpart in the principles relating to the amendment of the written statement. Therefore, addition of a new ground of defence or substituting or altering a defence or taking

inconsistent pleas in the written statement would not be objectionable while adding, altering or substituting a new cause of action in the plaint. The Apex Court has also held that in allowing an amendment of a written statement, the Courts are more liberal in allowing an amendment than that of a plaint as the question of prejudice would be far less in the former than in the latter case.

There is no doubt that amendments are liberally allowed as long as they do not work injustice to the other side and being necessary for the purposes of determining the real question between the parties. It is equally well settled that Courts are liberal in granting the prayer for amendment of pleadings unless serious injustice or irreparable loss is caused to the other side or on the ground that the prayer for amendment was not bonafide one. In the case at hand, the defendants having raised a counterclaim and the plaintiffs have filed their written statement to the same, the suit is now fixed for plaintiff's evidence. The defendants by the proposed amendment are trying to withdraw one plea and substituting it by another and this would certainly cause prejudice to the plaintiffs. The substitution belatedly attempted does not appear to be bonafide and, being so the learned trial Court was justified in refusing the application for amendment in terms of para 12 i.e. vi, vii, ix, xi, xii, xiv, xv and xvii. The other amendments being of formal character ought to have been allowed by the learned trial Court.

In the circumstances, petition is partly allowed. The application for amendment shall stand dismissed in terms of prayer clauses 12(vi, vii, ix, xi, xii, xiv, xv and xvii. The plaintiffs would be entitled to carry out the amendments in terms of other paras of para 12. Petition is partly allowed.

N. A. BRITTO, J.

RD.